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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1054

THE STATE NATIONAL BANK OF MARSHALL,
IN LIQUIDATION,
Petitioner,

vs.

W. D. TITTLE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The petition of THE STATE NATIONAL BANK OF MARSHALL, IN LIQUIDATION, respectfully shows this Honorable Court:

A

Summary Statement of the Matter Involved

Petitioner, a national bank in liquidation, sued respondent on a promissory note of December 31, 1941, as evidenced by two renewals. Trial was to a jury, pursuant to whose verdict the trial court entered a money judgment for petitioner. The Texas Appellate Courts reversed, and held,

in effect that the note was paid by reason of a verbal agreement between petitioner's Vice President, Thomas, and respondent. From the beginning, petitioner has contended that, under the jury verdict and implied findings of the trial court, the agreement was inoperative to effect payment of the note because it was in violation of the National Banking Laws, and the federal policy announced thereunder; that Thomas' fraud and deep financial interest in a Brick Co., whose funds he agreed to apply on the note, destroyed any implication of notice to the Bank through him. That the Bank had no actual notice, and received no benefit from the transaction.

B

Basis of Jurisdiction

1. Petitioner contends that it was denied a right, privilege or immunity, that it specially set up and claimed, under a statute of the United States; so that jurisdiction exists under *28 U. S. C. A.*, Section 344, subsection (b).

2. Petitioner contends it was denied recovery on a promissory note, unqualified on its face, by reason of a secret verbal qualification that was in contravention of the National Banking Laws (*U. S. C. A. Title 12*), and the federal policy announced thereunder (*D'Oench Co.* v. *F. D. I. Co.*, 315 U. S. 447, 86 L. Ed. 956). That the State Court held petitioner charged with its Vice President's knowledge of a transaction he fraudulently consummated for his own financial gain; whereas the federal decisions hold to the contrary.

3. The Judgment of the Texas Supreme Court was dated November 15, 1944 (R. 99), and became final upon denial of Motion for Rehearing on December 20, 1944 (R. 98).

4. In the trial court, respondent Tittle denied liability on a promissory note, which was unqualified on its face, by allegations of a verbal agreement between him and petitioner's Vice President, W. M. Thomas (R. 7). The substance of his averments was, that a short time before respondent executed his note, the National Bank Examiner had criticised the line of credit extended by the Bank to Waterman Brick & Tile Co., demanding that the same be reduced to the limit authorized by law (R. 7). That at the time, the Brick Co. had a large overdraft with the Bank for checks drawn on it, and paid by the Bank when the Brick Company's deposits were insufficient to cover the checks. That Thomas told respondent that the proceeds of the note he made would be used to take up the checks which the Brick Co. had drawn on the Bank, and which had not been charged to its account because of the insufficiency of its deposits (R. 8). That upon respondent agreeing for the proceeds of his note to be so applied on the Brick Company overdrafts, Thomas acting for the Brick Co. and the Bank (R. 7), agreed to apply the future proceeds of a certain government contract held by the Brick Co. on respondent's note until it was discharged; but although receiving such funds as deposits of the Brick Co., the bank failed to apply the same on the note (R. 7-8).

By supplemental petition, both by exceptions and pleas to the merits, petitioner averred that the verbal arrangement pleaded by respondent operated so as to cause the records of the bank to reflect that respondent's note was an unqualified asset of the bank; whereas if the agreement were enforced, the transaction would have amounted to a means of either advancing the Brick Co. additional excessive loans, or making the records of the bank untruthfully indicate that the excessive loans of the Brick Co. were not

as great as they were (R. 15-16). That Thomas being financially interested in the Brick Co., and to receive a benefit from the transaction, could not act as agent for it and the bank, due to adversity of interest (R. 17, 23); that the agreement was beyond the power and authority conferred upon Thomas by the National Banking Laws (R. 17-18); and that the agreement was a plan or scheme to evade the applicable provisions of the National Banking Laws, and against public policy (R. 19-20). That the transaction constituted a personal loan to Thomas by Tittle (R. 22).

Petitioner excepted to the action of the Trial Court in overruling its exceptions to respondent's answer (R. 33), and moved for an instructed verdict, because, among other reasons, respondent aided Thomas, by the agreement, etc., in the violation of the National Banking Laws and the federal policy announced thereunder, and could not benefit by such conduct (R. 33). The Trial Court overruled petitioner's motion for an instructed verdict, and later entered a judgment in favor of petitioner pursuant to the verdict of the jury (R. 45).

The Texarkana Court of Civil Appeals reversed and rendered the Judgment of the Trial Court (R. 59), following which petitioner seasonably presented a motion for rehearing containing all of the contentions urged herein (R. 60), and which was overruled (R. 75). It brought forward the points involved by way of Application for Writ of Error to the Texas Supreme Court (R. 76), which was granted (R. 81). That court affirmed the Judgment of the Texarkana Court of Appeals, and by Motion for Rehearing, and Motion for additional finding of facts lodged there (R. 88, 95), petitioner again urged all of the federal questions presented, but such Court overruled both motions (R. 98).

5. The following cases are believed to sustain the jurisdiction of this court to review the decision complained of:

Logan County Bank v. *Townsend*, 139 U. S. 67, 72-73;
Rankin v. *Barton*, 199 U. S. 228, 50 L. Ed. 163, and Annotations;
Seabury v. *Green*, 294 U. S. 165, 79 L. Ed. 836, 837;
Yates v. *Jones National Bank*, 206 U. S. 158, 51 L. Ed. 1002.

6. The substantiality of the questions involved is readily apparent from the fact that petitioner was denied recovery on respondent's note, solely by reason of the holding that the conduct of Vice President Thomas and respondent, in making the verbal arrangement about the discharge of the note, was not in violation of the National Banking Laws, or federal policy announced thereunder. Again, the sole means of binding petitioner by said verbal arrangement was by charging it with knowledge of Thomas' conduct under the "sole actor" doctrine, as applied to a national bank officer. The Texas Supreme Court refused to follow the federal decisions,[1] on these questions, and rendered judgment against petitioner by applying the rule announced in a Texas case,[2] that we believe is not in accord with the federal decisions.

Additional substance is given the question presented, when it is remembered that upon liquidation of petitioner bank, it was found that W. M. Thomas had placed among its assets better than $60,000.00 worth of so-called "accom-

[1] *Bank* v. *Miller*, 229 U. S. 517, 57 L. Ed. 1310.
Federal Deposit Ins. Co. v. *Vest*, 122 Fed. (2d), 765.
Cert. denied 314 U. S. 696, 86 L. Ed. 577.
Am. Surety Co. v. *Pauley*, 170 U. S. 133, 156, 158-159.
D'Oench Co. v. *F. D. I. Co.*, 315 U. S. 447, 86 L. Ed. 956.
Dietrick v. *Greaney*, 309 U. S. 190, 84 L. Ed. 694, 697, et seq.

[2] *Goldstein* v. *Union Natl. Bank, et al.*, 109 Tex. 555, 213 S. W. 584.

modation notes", such as respondent contends his was (R. 161). Necessarily, the decision of this case will determine whether these notes, absolute on their face, may be sworn away by alleged verbal agreements between Thomas and the respective makers, which could be known to the bank only through Thomas.

C

Questions Presented

Respondent's note was unqualified on its face. By his action and that of Thomas alone, it was placed without qualification among the assets of the bank as a personal liability of respondent. Respondent swore that the purpose of this was to "take care of" an overdraft of the Brick Co. which *could not be shown* on the books of the bank (R. 134, 135, 136, 139-40). But from its future deposits with petitioner, the Brick Co. was yet to discharge the obligation thus concealed by respondent's note transaction (R. 123, 139-140). The jury found that when Thomas agreed to apply the Brick Co. funds on respondent's note, Thomas did not intend to perform the agreement (Issue 4, R. 39); thus Thomas was acting fraudulently toward the Bank. Thomas had deep financial interest in the Brick Co. (R. 151; 171), but the Texas courts held the bank responsible for his failure to apply its funds on the note, and held his knowledge to be that of petitioner. We urge the following questions, or matters, for consideration:

(1) Respondent consciously aided Thomas to place the former's unconditional note among the assets of the bank, in lieu of an overdraft of the Brick Co., which could not (without disclosing a violation of national banking laws) be shown upon the books of the bank. Yet, under respondent's contention, the primary obligation on the note was that of the Brick Co., in that it was to be discharged solely

from funds of the Brick Co., which were to be deposited in the bank in the future (R. 123). By thus aiding Thomas to conceal the existing obligation of the Brick Co., through executing a note in his name, but which was to be paid by the Company, Respondent aided or abetted Thomas in making a false entry in the report or statement of the bank, contrary to *12 U. S. C. A.*, Section 592. Also he aided Thomas in receiving a fictitious obligation in order to evade the National Banking Act, in violation of *12 U. S. C. A.*, Sec. 591. The note was carried through at least one bank examination, at which time the examiner required the payment of a different and unconcealed excessive loan of the Brick Co. (R. 161, 171).

(2) In the foregoing paragraph it is assumed that when Respondent executed his note the overdraft was an existing obligation of the Brick Co.; although carried as a cash item, rather than being charged to its account. If it was not then a Brick Co. obligation, the transaction between respondent and Thomas operated to extend a loan of $3,000.00 by the bank to the Brick Co. through respondent. This, in that respondent was never to pay the note under the arrangement, or at least, was to pay it only if the Brick Co. failed so to do (R. 123, 135). Consequently, the Brick Co. was the primary borrower (through Tittle), and respondent's liability was secondary. Respondent thus participated in a scheme whereby the Brick Co. (then owing within $500.00 of its legal limit) procured an excessive loan in contravention of *12 U. S. C. A.*, section 84. Respondent aided Thomas to conceal the loan by reason of the verbal agreement.

(3) The facts found by the jury, and impliedly found by the trial court in aid of his judgment,[3] establish that

[3] See Texas Rules of Civil Procedure No. 279, Appendix A and B; also Vernons Tex. Rules of Civ. Proc., p. 296.

Respondent's note transaction was for the sole purpose of loaning Thomas the proceeds of the note personally (Issues 14-17, R. 41-42). The undisputed evidence showed Thomas did not attempt to bind the bank by the verbal agreement, or make it on the Bank's behalf (R. 128, 127, 150-51). So considering the facts, Tittle first borrowed the money from the bank, and then loaned it personally to Thomas under the verbal agreement. Otherwise, Tittle acted as the instrument through which Thomas indirectly borrowed money from his own bank, in violation of *12 U. S. C. A.*, section 375a. In neither event, could respondent set up the verbal agreement as a defense to the bank's suit on the note.

(4) The findings of the jury and trial court, together with the undisputed facts, establish that Thomas was transacting his personal business or that of the Waterman Brick & Tile Co. in making the verbal arrangement with Respondent. That he acted in fraud of the bank. In these circumstances, his interest was so adverse to the bank, as that he dealt with it at arm's length, and consequently his knowledge of the transaction was not imputable to the bank, even under the "sole actor" doctrine.

(5) The contemporaneous oral argeement changing the time and manner of paying the promissory note violated the parol evidence rule.

D

Reasons Relied On for the Allowance of the Writ

In denying petitioner recovery, the Texas Supreme Court deliberately ignored the applicable decisions of this court, and which, it is believed, are contrary to that court's decision. It did not pay the decisions of this court the doubtful homage of mentioning them, but considered petitioner foreclosed on the federal questions presented by the Texas

Court's decision in the *Goldstein Case*,[4] of the vintage of 1919. The very transaction upheld in that case was made unlawful on June 16, 1933 by an act of Congress (*48 Stat. 182, 12 U. S. C. A. 375a*). And in interpreting this statute, the Sixth Circuit Court of Appeals conceived one of its principal purposes to be the decrease of the hazard of one-man bank control (*122 Fed. (2d) 765, 767*). The Circuit Court opinion was based on the reasoning of the decision of this court in *Deitrick* v. *Greaney*, 309 U. S. 190, 84 L. Ed. 694, as later elaborated in *D'Oench Co.* v. *F. D. I. Corp.*, 315 U. S. 447, 86 L. Ed. 956.

Again, this court refused to charge a National Bank with the knowledge of its dominating officer under the "sole actor" doctrine, where such officer had a financial interest in the transaction involved that was adverse to the Bank (*Bank* v. *Miller*, 229 U. S. 517, 57 L. Ed. 1310). The Texas courts held to the contrary in the present case.

We conceive that the institution of banking is affected with such public interest, as that the decisions of this court interpreting the National Banking Act, banking practices thereunder, and the legal principles by which the conduct of banking officers are to be measured, should be uniform throughout the States. It is our sincere opinion, that if the State decision in this case be not reviewed, the National Banking Act, and the policies to be enforced thereunder, will be differently construed in Texas than elsewhere in the United States; at least until this court does grant a writ in some Texas case and change the State Supreme Court's erroneous conception of the National Banking laws.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

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[4] *Goldstein* v. *Union National Bank, et al.*, 109 Tex. 555, 213 S. W. 584.

this Honorable Court, directed to the Supreme Court of Texas, commanding that court to certify and send to this Court for its review and determination, on a day certain be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. A-184, *The State National Bank of Marshall, in Liquidation, Petitioner*, v. *W. D. Tittle, Respondent*, and that the said judgment of the Supreme Court of Texas may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE STATE NATIONAL BANK OF MARSHALL,
IN LIQUIDATION,
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